1996

Brad Bauman, Cassedy Stien v. Marriott Ownership Resorts : Reply Brief

Utah Court of Appeals

Ryan E. Tibbitts; Julianne P. Blanch; Snow, Christensen & Martineau; Attorneys for Shari Levitin; Bryon J. Benevento; Matthew M. Durham; Van Cott, Bagley, Cornwall & McCarthy; Attorney for Defendant Marriott Ownership Resorts; Janet A. Goldstein; Attorney for Defendant Peter Gatch; Joseph T. Huggins; Attorney for Tom Messina; Duane R. Smith; Cameron S. Denning; Dart, Adamson & Donovan; Attorneys for Brent Ferrin.

Gregory J. Sanders; Sandra L. Steinvoort; Kipp and Christian; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

BRAD BAUMAN,	:	
Plaintiff,	:	
CASSEDY STIEN,	:	
Plaintiff/Appellant,	:	
vs.	:	
MARRIOTT OWNERSHIP RESORTS, INC., SHARI LEVITIN, TOM MESSINA, BRENT FERRIN and PETER GATCH,	:	Case No. 960798-CA Priority 15
Defendants/Appellees.	:	

REPLY BRIEF OF APPELLANT, CASSEDY STIEN

APPEAL FROM SUMMARY JUDGMENT
GRANTED BY THE THIRD JUDICIAL DISTRICT COURT,
SUMMIT COUNTY, STATE OF UTAH
THE HONORABLE PAT BRIAN PRESIDING

Ryan E. Tibbitts
Julianne P. Blanch
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Shari Levitin
P. O. Box 45000
Salt Lake City, UT 84145-5000
Telephone: (801) 521-9000

Gregory J. Sanders
Sandra L. Steinvoort
KIPP AND CHRISTIAN, P.C.
Attorneys for Appellant
10 Exchange Place, 4th Floor
Salt Lake City, UT 84111
Telephone: (801) 521-3773

See inside for continuation of opposing counsel

CONTINUATION OF COUNSEL FOR APPELLEES:

Bryon J. Benevento, Esq.
Matthew M. Durham, Esq.
VAN COTT, BAGLEY, CORNWALL
& McCARTHY
Attorney for Defendant
Marriott Ownership Resorts
P. O. Box 45340
Salt Lake City, UT 84145

Janet A. Goldstein
Attorney for Defendant
Peter Gatch
Deer Valley Plaza
Box 4556
Park City, UT 84060

Joseph J. Huggins
Attorney for Tom Messina
243 East 400 South
Metro Place, Suite 200
Salt Lake City, Utah 84111

Duane R. Smith
Cameron S. Denning
DART, ADAMSON & DONOVAN
Attorneys for Brent Ferrin
310 South Main Suite 1330
Salt Lake City, UT 84101

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P. O. Box 45000
Salt Lake City, UT 84145-5000
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Gregory J. Sanders
Sandra L. Steinvoort
KIPP AND CHRISTIAN, P.C.
Attorneys for Appellant
10 Exchange Place, 4th Floor
Salt Lake City, UT 84111
Telephone: (801) 521-3773

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A. Introduction

A comparison of the Stien opening brief with the responsive brief of the Defendants shows a considerable difference in the conceptual framework of the arguments made. Stien takes a straight-forward approach of explaining that Utah law on Invasion of Privacy is not well developed. Stien explains in her opening brief that the Restatement (Second) of Torts is often recognized by Utah courts as a source of authority to develop law. Stien then reviews the element of each of the four branches of the tort of Invasion of Privacy and explains why there are issues and facts for trial.

By contrast, the conceptual framework of the Brief of Appellees is to make the common error on appeal of creating a legal straw man and avoiding direct analysis of the issues presented by the appeal. This Reply Brief will explain how Stien's arguments raised are not met.

B. Appellees Elevate Form Over Substance.

A common thread running through the multiple arguments of *Appellees is that because Ms. Stien was not identified by name nor* was her likeness shown she could not have an invasion of her privacy interest. The problem with that argument is that it is far too restrictive and exalts form over substance. The argument

ignores the context in which the video was made and displayed.

The discussion of the sex life of Bauman and Stien occurred in the context of a well attended corporation Christmas party at which people were present who knew the identity of Ms. Stien. When the superscript was placed on the screen of "what is it like to have sex with your partner" and Mr. Bauman was shown, there could be little doubt about whom reference is being made unless the implication was that Brad Bauman was engaged in adultery. To argue that Bauman's so called "partner" was not shown or stated by name is an extraordinarily fine line to be drawn. The line drawing is inappropriate in light of Utah public policy to protect privacy. That Ms. Stien was recognizable as a subject of the sex discussion is reinforced by the reference of Mr. Bauman to his "wife" in the video. At worst, a question of fact for trial is presented.

As pointed out in the principal brief, *Redding v. Brady*, 606 P.2d 1193 (Utah 1980) recognized that Utah law protects against "shame or humiliation" arising from violation of privacy interests. Whether there is sufficient information presented in the video to identify Ms. Stien is a question of fact for trial. Human interaction has nuance beyond whether her name or picture appeared. Enough is alleged that a jury could reasonably find that the tape refers to her private matters and she would be recognized by a group of people that know Bauman and her.

C. First Amendment Analysis Is Not Helpful.

A second major theme which threads through the response of the Appellees is that the First Amendment protects this tasteless entertainment. Appellees analyze by creating a straw man concerning First Amendment rights. A close reading of the Appellees' Brief shows that they rely entirely upon First Amendment press cases. In each of those cases, the underlying complaint involved formal publication of alleged defamatory material in a printed publication or magazine. For example, *Fudge v. Penthouse International, Ltd.*, 840 F.2d 1012 (1st Cir. 1988), involved the publication of a picture of four school girls in Penthouse Magazine without their permission. The court discusses at length the First Amendment implications of magazines and newspapers and speaks of the "social context" of a picture in a magazine and the purpose for which the picture was published. The Court found significant First Amendment press interests that outweighed the likelihood of harm.

In *Pring v. Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982), the court considered an article in a magazine that created a fantasy discussion of the sexual activity of Miss Wyoming. The case does not discuss the invasion of privacy issues as the Court found that the First Amendment protects the publication under analysis of freedom of press issues.

Another example of a strained analogy is the Appellees' use of *Salek v. Passiac Collegiate School*, 605 A.2d 276 (N.J.Super. 1992),

which considered the juxtaposition of pictures of two teachers in a school yearbook in which a female teacher is implied to be turning down the sexual proposition of a male teacher. The trial judge correctly held as a matter of law that the implication of turning down a sexual proposition could not be defamatory or invade privacy. This case does not involve an active commentary of an individual's sexual activity, as here.

Stien presents no First Amendment protected publication issue. The analogy fails because the balancing interests of the press contained in the cases cited by Appellees is not present here. Should Appellees want to argue by analogy, they should have compared cases of private parties defending defamation claims. Stien's opening brief points out that publication isn ot even as element for three of the tort theories.

Appellees try to wring more out of their First Amendment analogy by hinting that Ms. Stien is a public figure whose reputation and privacy may be more liberally assailed. See Appellees' Brief, Page 14, Footnote 5. Stien does not claim that she was defamed and the public figure comparison is inappropriate. A public figure is a term of art applicable to persons who are thrust into public view by controversy and for which the public interest is served by a higher standard of malice in asserting defamation claims. See *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896 (Utah 1992).

The real danger of spending time discussing First Amendment cases is that it begs the question of the interests the law protects. What is at issue in this litigation are privacy interests and not reputation interests as with the defamation cases. Certainly, there can be some overlap in analysis, as demonstrated by the press cases relied upon by the Appellees, but the overlap is not complete. Otherwise, there would be no purpose in recognizing separate causes of action. See *Russell, Id.*, which affirmatively states the torts of privacy invasion and defamation are not the same.

That the First Amendment analogy is inappropriate in this case is demonstrated by a simple fact scenario. No one could seriously argue that an employer would be free to physically injure Bauman and Stien pursuant to a practical joke. The law would protect their interest in physical security. Here, the law is protecting their interest in privacy and it is the injury to privacy by a claimed practical joke for which remedy is sought. Defendants cheapen the First Amendment by invoking its protection raised in cases that involve formal publication of written material. This is not an overlapped case with a free speech issue as Stien complains the video invades her recognized privacy interest rather than defame her.

As Appellee points out in her opening brief, there is an overlay of public policy to this case concerning the relationships

between employers and employees. Stien makes no pretense that she is an employee of the defendant, but there can be no serious dispute that this incident arises out of the employer/employee relationship of her husband. Appellees try to sidestep these public policy issues by simply stating Stien is not an employee and claiming they do not understand the citation of *Bodewig v. K-Mart, Inc.*, 635 P.2d 657 (OR.App. 1981). See Appellee's Brief, Page 15, Footnote 6. What *Bodewig* demonstrates is that there are limits to the employer's right to control and demand obedience of employees. The use of an employee and a spouse's privacy for a practical joke is, by common social sense, outside the proper employer relationship as a matter of public policy. Construction of the law and facts should be made in light of the employer here having no legitimate legal or social reason to make entertainment out of society's most private matter.

CONCLUSION

This Reply Brief does not attempt to make a point by point response to the brief of the Appellees. Both sides struggle with the lack of case law in Utah to give guidance on the application of new tort law to the facts presented. How Stien addresses this void in Utah law is to simply take the plain language of the Restatement of Torts and apply it to the facts. The Appellees approach the absence of Utah law by analogizing to First Amendment press cases in other jurisdictions.

The Stien approach is the better approach because it preserves the privacy interest which Utah law protects without getting into discussions of defamation and reputation, both issues which have not been raised by Stien. Instead, Stien takes a common sense approach that says one need only look at the context of the video to see that the failure to mention her by name or to show her is inconsequential. The people present, who knew Brad Bauman and her, know to whom the tape was referring. Whether the nexus is sufficient to support fully a claim and the scope of the injury to Stien are all matters of fact for resolution at a trial.

This Court should recognize the four alternative legal theories of invasion of privacy and should recognize that Ms. Stien has presented facts which raise genuine issues for a jury to consider and evaluate. The District Court should be reversed and the case remanded for trial.

DATED this 6th day of March, 1997.

KIPP AND CHRISTIAN, P.C.

GREGORY J. SANDERS, ESQ.
SANDRA L. STEINVOORT, ESQ.
Attorneys for Appellant

ADDENDUM

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, postage prepaid, two copies of the foregoing Reply Brief to the following:

Ryan E. Tibbitts
Julianne P. Blanch
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Shari Levitin
P.O. Box 45000
Salt Lake City, UT 84145-5000

Bryon J.Benevento, Esq.
Matthew M. Durham, Esq.
VAN COTT, BAGLEY, CORNWALL
& McCARTHY
Attorney for Defendant
Marriott Ownership Resorts
P.O. Box 45340
Salt Lake City, UT 84145

Janet A. Goldstein
Attorney for Defendant
Peter Gatch
Deer Valley Plaza
Box 4556
Park City, UT 84060

Joseph T. Huggins
Attorney for Tom Messina
243 East 400 SOUTH
Metro Place, Suite 200
Salt Lake City, UT 84111

Duane R. Smith
Cameron S. Denning
DART, ADAMSON & DONOVAN
Attorneys for Brent
310 SOUTH Main, Suite 1330
Salt Lake City, UT 84101

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